85-707

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CITY OF PHILADELPHIA,
Petitioner,

v.

BOROUGH OF GLASSBORO, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari
to the Supreme Court of New Jersey

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QUESTION PRESENTED FOR REVIEW

Whether or not a New Jersey court order that enjoins the City of Philadelphia, as well as all other out-of-state solid waste generators, from disposing of solid waste in a privately-owned New Jersey landfill on the grounds that the landfill is a scarce resource needed by local New Jersey communities, which communities would find alternative disposal sites more expensive, violates the Commerce Clause of the United States Constitution.

LIST OF ALL PARTIES TO PROCEEDINGS

Petitioner

City of Philadelphia*

Respondents

Borough of Glassboro
County of Salem
County of Camden**
Gloucester County Board of Chosen Freeholders**

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*In the case below, the following parties were included, along with the City of Philadelphia, as defendants:

Gloucester County Board of Chosen Freeholders
County of Camden
The New Jersey Department of Environmental Protection
Robert E. Hughey, Commissioner of the New Jersey Department of Environmental Protection
Kinsley Landfill, Inc.

**As the interests of the Gloucester County Board of Chosen Freeholders and the County of Camden, originally named as defendants in the Glassboro complaint,

Township of Deptford**
Board of Health of the Borough of Glassbor
Borough of Clayton
Borough of National Park
Borough of Pitman
Borough of Swedesboro
Borough of Wenonah
Borough of Westville
Camden County Municipal Utility Authority
City of Woodbury
Township of Franklin
Township of Monroe
Township Pennsauken
Township of West Deptford
Township of Woolwich
Ray MacKay, Jr., Waste Removal Inc.
Landis Sewerage Authority
Rockaway Valley Regional Sewage Authority
Clementon Sewerage Authority

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and the Township of Deptford, a defendant-intervenor, are aligned and co-extensive with those of the plaintiffs and plaintiff-intervenors below, we have listed them as respondents to this petition.

Deptford Township, Edward Lawrenson, Inc., Quick-Way, Inc., Hancock Waste Removal, Ace Service Corporation, W. Lafferty, Inc. and A & B Dump Truck Services intervened below as defendants.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey in No. A-179, September Term, 1984 was filed on July 10, 1985 and is reported at 100 N.J. 134, 495 A.2d 49 (1985). The opinion of the Superior Court of New Jersey, Appellate Division, in No. A-1440-84 T5 was filed on February 15, 1985 and is reported at 199 N.J. Super. 91, 488 A.2d 562 (1985). The opinion of the Superior Court of New

Jersey, Law Division, in No. L-070476-84 P.W. was filed on November 13, 1984 and is not officially reported. Copies of all of the opinions appear in the Appendix hereto.

STATEMENT OF JURISDICTION

An order for preliminary injunction was entered in the New Jersey Superior Court, Law Division, against petitioner City of Philadelphia on November 13, 1984. This order was affirmed by the New Jersey Superior Court, Appellate Division, by opinion dated February 15, 1985. The judgment of the Appellate Division was then affirmed by the New Jersey Supreme Court by opinion dated July 10, 1985.

The jurisdiction of the United States Supreme Court to review the decision of the New Jersey Supreme Court is invoked pursuant to and in accordance with 28 U.S.C. §1257(3) and 28 U.S.C. §2101(c).

TEXT OF CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article I, Section 8, clause 3:

The Congress shall have the Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

On July 10, 1985, the Supreme Court of New Jersey affirmed the exclusion of solid waste generated in Pennsylvania, solely on the basis of its origin, so that landfill space in New Jersey could be reserved for the exclusive use of New Jersey communities. In so affirming, the New Jersey court flaunts the dictates of Philadelphia v. New Jersey, 437 U.S 617 (1978).

Since the 1950's, the City of Philadelphia has sent its solid waste to the Kinsley Landfill, a solid waste disposal facility located in Gloucester County, New Jersey. The landfill is privately owned but is operated as a public utility under New Jersey law. For the fiscal year ending June 30, 1984, the City's utilization of Kinsley represented 30 percent of

the total disposal at Kinsley, but nearly 40 percent of all municipally-collected waste generated within the City. Another 26 percent of the total disposal at Kinsley was attributable to solid waste generated within the City but disposed at Kinsley by private waste haulers pursuant to contracts with private businesses and industries in Philadelphia. Virtually all of the solid waste generated within New Jersey and deposited at Kinsley emanated from three New Jersey counties: Gloucester, Salem and Camden. In the third quarter of 1984, New Jersey municipalities outside of this tri-county area contributed only approximately six percent of all waste disposed of at Kinsley, with the bulk of that six percent consisting of sewage sludge.

After receiving notice on October 11, 1984 that Kinsley was reaching its per-

mitted capacity and would cease accepting waste on October 28, 1984, respondent Borough of Glassboro instituted suit on October 17, 1984 in the Superior Court of New Jersey, Law Division, seeking (a) an order enjoining the closing of Kinsley and directing an emergency expansion of the landfill and (b) an injunction restraining the City of Philadelphia and Camden County, New Jersey from disposing of their solid waste at Kinsley (App. at 131A). In its answer to the complaint, the City of Philadelphia raised the defense that the relief sought by the New Jersey municipality against it was violative of the Commerce Clause of the United States Constitution (App. at 186A). Other New Jersey municipalities and a private New Jersey waste hauler subsequently intervened in this action as plaintiffs, while the

private waste haulers who disposed of waste generated in Pennsylvania at Kinsley intervened as defendants.

After conducting evidentiary hearings, the New Jersey Superior Court temporarily enjoined the closing of Kinsley and ordered the owners of the landfill to design a 16-foot vertical expansion of the disposal facility (App. at 126A). The court also ordered the New Jersey Department of Environmental Protection (DEP) to review the design to ascertain its effect on the local environment and to formulate a plan for the orderly closure of the landfill. The court reserved its decision on excluding Philadelphia and Camden County pending further hearing.

In its report to the court, DEP found the proposed 16-foot vertical lift acceptable (subject to certain corrections)

and submitted its plan for closure (App. at 197A). DEP concluded that the proposed expansion would last approximately three and one-half months if all of the current Kinsley users continued at their present rate of disposal. However, DEP stressed that since waste generated within Philadelphia and other Pennsylvania communities (none of which were parties in this proceeding) accounted for the majority of the waste disposed of at Kinsley, the capacity of the landfill would not be reached for approximately one year if Kinsley were ordered to cease accepting out-of-state waste. DEP therefore recommended that access to Kinsley for waste disposal should be limited to municipalities in the tri-county area of Gloucester, Salem and Camden, and that access be denied to the City of Philadelphia and all other out-of-state users.

On November 13, 1984, the New Jersey court adopted the report of DEP in its entirety and issued a preliminary injunction restraining the closing of Kinsley and ordering the requested 16-foot vertical expansion of the facility (App. at 118A). Furthermore, the court, while directing Gloucester, Salem and Camden counties to establish operational landfills within their borders by November, 1985 and to maximize their recycling efforts, permitted the New Jersey municipalities in those three New Jersey counties to continue to use Kinsley to dispose of their solid waste. However, the trial court enjoined, effective November 27, 1984, the disposal at the landfill of "all solid waste generated within the City of Philadelphia and other Pennsylvania communities, and other out of district solid waste not sub-

ject to interdistrict agreements" (App. at 120A). (Camden County was allowed access to Kinsley because it had executed an interdistrict waste-flow agreement with Gloucester County shortly before the November 13, 1984 preliminary injunction. Salem County had executed its waste-flow agreement with Gloucester County only five months before that.) The court also restrained the disposal of all sewage sludge at Kinsley as of March 15, 1985.

In issuing its order, the New Jersey trial court stated from the bench that in Philadelphia v. New Jersey, 437 U.S. 617 (1978), this Court distinguished

> the test to be applied when a statutory authority was discriminatory on its face and the test applicable when a statutory authority regulates even-handedly to effectuate a legitimate public interest imposing an incidental burden on interstate commerce. The latter test is, and I quote, "The statute will be upheld unless the burden imposed on such commerce is clearly excessive in

relationship to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Philadelphia v. New Jersey, 437 U.S. at 624, citing Pike v. Bruce Church, Inc., 397 U.S. 137. * * * In the case at bar, the requirement of inter-district waste flow agreements to insure the integrity of the county or district plan as part of a coordinated statewide management of waste facilities was a requirement imposed on in-state districts as well as out-of-state districts. The burden on interstate commerce was minimal in light of the same burden being placed on in-state districts.

* * * *

I balanced the equities in that I visualize the horrendous specter of tomorrow trash piling up in the vicinty of this courthouse. I have considered sky-rocketing municipal costs, which, of course, goes -- and I have said this many times and I will say it again, because we are talking frankly today, because this is a problem that affects all of us. The poor taxpayer, he takes it on the chin when he gets the tax bill,

sky-rocketing municipal costs in placing this trash elsewhere. I've considered the poor citizens of Deptford Township, who have lived with this ordeal as the testimony and the record reveals to this court. An lastly -- before that, I've considered Philadelphia's plight and have not treated that lightly. But I felt for the reasons that I stated that I must do what I had to do today in regard to this horrendous problem. And lastly, I've considered the vast specter, the vast plan of trash disposal not only in Gloucester County. I've considered my decision on how it affects Salem County, Camden County, all the municipalities and most important all of the citizens of the State of New Jersey. I have, in effect, issued these orders bearing in mind the balancing of these equities and I find and determine for the reasons that I have given on the record today that the orderly closure of Kinsley can be best accomplished as I have outlined it and as has been recommended by the DEP, that all the citizens of the State of New Jersey, Gloucester, Camden and Salem counties and, of course, Deptford Township will benefit by this decision and I have employed what I feel are equitable and just principles in an effort to avoid doomsday trash disposal, which is upon us today.

Stenographic Transcript of Decision of the Superior Court of New Jersey, Law Division,

Gloucester County (November 13, 1984) (App. at 95A-97A & 109A-111A).

On November 16, 1984, the New Jersey court denied the City of Philadelphia's motion for an order, inter alia, allowing the City, subject to the same conditions as the court imposed on the New Jersey municipalities, to continue to dispose of its solid waste at Kinsley, at a voluntarily reduced level of 40 percent under its current disposal level, for a period of time coextensive with the New Jersey municipalities. On November 21, 1984, the trial court similarly denied the City's motion that a second vertical expansion to Kinsley Landfill be designed and implemented, stating that it was "not relevant to the City of Philadelphia." Stenographic Transcript of Decision of Superior Court of New Jersey (November 21, 1984) at 70-71.

Furthermore, the court rejected the City's request that it consider alternatives which the New Jersey municipalities could have adopted to permit them to accommodate such loss of access to Kinsley as the court had found that the City of Philadelphia supposedly could accommodate, even though there was unrebutted testimony before the court that the City was then currently unable to accommodate a total exclusion from Kinsley. Although DEP concluded in its report to the court that "at present there are in fact no alternative sites in the State of New Jersey to which it would be feasible to redirect the waste flows presently disposed of at the Kinsley Landfill" (App. at 200A), the record nonetheless revealed (1) that the court had found that in August, 1984, Gloucester County had negotiated for the

use of the Colebrookdale Landfill located in Bucks County, Pennsylvania, approximately 75 miles from Gloucester County, as an alternative waste disposal site to Kinsley (App. at 218A), and (2) that Camden County admitted in its answer to the complaint that it had sited two resource recovery facilities and was currently siting a third to meet the needs of its constituent municipalities and, potentially, those of Gloucester County as well.

On November 29, 1984, the New Jersey court issued an order "clarifying" its November 13, 1984 order, declaring that various New Jersey parties (including some outside the tri-county area) could continue to dispose of their sewage sludge at Kinsley until further order of the court, without regard to whether they had executed interdistrict waste-flow agreements with

Gloucester County covering that form of solid waste (App. at 123A). Since most of the solid waste disposed of at Kinsley by New Jersey communities outside of the tri-county area consisted of sewage sludge, the reinstatement of sewage sludge disposal at Kinsley was tantamount to reserving Kinsley solely for the use of New Jersey waste generators, both within and beyond the tri-county area, to the exclusion of all out-of-state waste generators.

The City of Philadelphia appealed the order of the New Jersey Superior Court, Law Division, to the New Jersey Superior Court, Appellate Division. In the appellate court, the City made three constitutional arguments:

1. The lower court's order totally excluding solid waste generated within the City of Philadelphia and all other out-of-state communities from the Kinsley Landfill, while permitting the disposal of waste generated in New Jersey to continue unabated,

constitues blatant economic protectionism and is per se invalid under the Commerce Clause of the United States Constitution;

2. Even if this court finds that the exclusion of the City of Philadelphia and all other out-of-state generators from access to the Kinsley Landfill is not a per se violation of the Commerce Clause, such an exclusion as applied to the facts of this case constitutes a violation of the Commerce Clause; and

3. Even if this court finds that the exclusion of out-of-state generators from access to the Kinsley Landfill is not a per se violation of the Commerce Clause or a violation of the Commerce Clause as applied, the lower court's order barring Philadelphia from using the private landfill violates the mandated balancing test under the Commerce Clause where the outright exclusion poses a substantial burden on interstate commerce and there are less restrictive alternatives available which would have promoted local interests without posing as onerous a burden on interstate commerce.

In an opinion filed on Feburary 15, 1985, the New Jersey Superior Court, Appellate

Division, affirmed the order of the lower court, holding that

> the lost access by Philadelphia and others to the Kinsley site for one year was not a "clearly excessive" concern for local interests in comparison to the "substantial state interest * * * in easing solid waste disposal problems." Minnesota v. Clover Leaf Creamery Co., 49 U.S. 456, 473, 101 S.Ct. 715, 729, 66 L.Ed.2d 659 (1981). Even in Philadelphia v. New Jersey, 437 U.S. at 624, * * * the Supreme Court observed its understanding "that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." Moreover, but for the judge's order crafted to confront this health emergency, Kinsley would now be closed, because it would have reached its design limits; Philadelphia would have no access, nor would anyone else. We would have left only a public-health crisis in New Jersey. We do not think that the Constitution compels such fatalism.
>
> * * * *
>
> We deem this minimal local burden imposed on interstate commerce for bona fide public safety concerns a constitutionally acceptable imposition. As the cases state, at a certain point in matters involving

> public safety, Commerce Clause considerations must yield to police power. * * * Our review of this matter persuades us that Judge DeSimone's order has respected that delicate balance [between the sanctity of the federal system and local concerns] in this most difficult situation. * * * We must stress that the order of Judge DeSimone in effect forecloses use of the landfill by both in-state and out-of-state users beyond the tri-county area.

488 A.2d 562, 568 & 570 (1985) (App. at 68A-69A & 78A-79A).

Thereafter, the City of Philadelphia appealed to the Supreme Court of New Jersey. In that court, the City made four constitutional arguments:

1. The Appellate Division erred by failing to find that the trial court's order totally excluding from Kinsley solid waste generated within Philadelphia and all other out-of-state communities, while permitting the unabated disposal of New Jersey waste, constitutes blatant economic protectionism and a per se violation of the Commerce Clause;

2. The Appellate Division erred by holding that exigent circumstances constitutionally justify the

embargo imposed on waste generated outside of the State of New Jersey;

3. The Appellate Division erred in holding that the trial court's order was immune from Commerce Clause scrutiny because some New Jersey generators as well as out-of-state generators of solid waste are foreclosed from access to Kinsley; and

4. Even if this court finds that the exclusion of all out-of-state generators from access to the Kinsley Landfill is not a per se violation of the Commerce Clause, the Appellate Division erred by failing to find that the trial court's embargo violated the mandated balancing test under the Commerce Clause, since it is a direct regulation of interstate commerce, and there are less restrictive alternatives available which would have adequately protected local interests without imposing as onerous a burden on interstate commerce.

In an opinion filed on July 10, 1985, the New Jersey Supreme Court affirmed the decision of the New Jersey Superior Court, Appellate Division, stating:

> As an equitable remedy, the [trial court's] decree merely preserves space at Kinsley for certain munic-

> ipalities that, as a practical matter, do not have access to other landfills, while remitting other municipalities including Philadelphia, to alternative sites. Additional garbage from any source, either within or outside New Jersey, will displace space at Kinsley needed to avert a health crisis in the three counties. * * * We conclude that the injunction is not discriminatory in purpose or effect. It is plainly not a mere protectionist measure and, therefore, does not constitute a per se violation of the Commerce Clause. Philadelphia v. New Jersey, [437 U.S. 617, 623, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475, 481 (1978)].

495 A.2d 49, 56 (1985) (App. at 28A-29A).

However, the New Jersey Supreme Court further stated:

> We are aware also that the loss of access to Kinsley will impose added costs on Philadelphia. Were it not for the injunction, however, the landfill would be closed not only to former customers outside the tri-county area, such as Philadelphia, but also to those within the three counties. So considered, the effect of the injunction on interstate commerce is incidental. Philadelphia v. New Jersey, supra, 437 U.S. at 624, 98 S.Ct. at 2535, 57 L.Ed.2d at 482; Pike v. Bruce Church, Inc.,

supra, 397 U.S at 142, 90 S.Ct. at 847, 25 L.Ed.2d at 178.

Even if the effect could be characterized as more than incidental, the burden falling on Philadelphia would not be "clearly excessive." Pike v. Bruce Church, Inc., supra, 397 U.S. at 142, 90 S.Ct. at 847, 25 L.Ed.2d at 178. Philadelphia's lost access to an exhausted landfill must be contrasted with the disastrous results that its continued use would visit on the tri-county municipalities. With respect to the economic impact of the closure, the Appellate Division observed that Philadelphia, a city of approximately 1.7 million people with a solid waste disposal budget of approximately $4,000,000, would suffer much less than the 59 municipalities in the tri-county area. 199 N.J. Super. at 100, 488 A.2d at 567.[1] The

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1 The Appellate Division of the New Jersey Superior Court actually found that the closing of Kinsley would increase the City of Philadelphia's Streets Department budget by 5% of $91 million dollars or $4 million in the first year, and not that the Streets Department's existing budget was $4 million. Glassboro v. Gloucester County Board of Chosen Freeholders, 199 N.J. Super. 91, 100, 488 A.2d 369, 567 (1985).

> estimated increase in Philadelphia's budget for solid waste disposal is 5% for the first year following Kinsley's closure and 2% thereafter. Id. By contrast, the solid waste disposal budget of Glassboro, a municipality of some 14,500 people, "could escalate from $100,000 to $1,000,000 per year * * *," and the cost to Camden County, with a population of approximately 500,000 people, could increase from $3,000,000 to $12,000,000 annually. Id.
>
> The closure of Kinsley, however, involves more than cost considerations. It would force the tri-county municipalities to embark on a crash garbage disposal program, one that would include, for example, siting and establishing transfer stations to store garbage temporarily, pending delivery to permanent site. Such a program, as formidable and costly as it would be, would become obsolete in one year, when the new dump sites become operative. * * * Thus, practical considerations demonstrate that the task confronting the tri-county municipalities would be not merely difficult, but virtually impossible to perform. Such considerations confirm the burden on Philadelphia is not excessive.

495 A.2d at 58-59 (footnote added) (App. at 40A-43A).

Finally, the New Jersey Supreme Court determined that the threat to local health, as found by the trial court, could not be averted by a less restrictive injunction:

> Based on the record before us, a plan that accorded to Philadelphia access, even if proportionately reduced, would foreshorten the life of the landfill. Such a plan would not merely be a less effective means of obtaining time for the development of alternative sites; it would be ineffective. See Minnesota v. Clover Leaf Creamery Co., supra, 449 U.S. at 464, 473-74, 101 S.Ct. at 724, 728-29, 66 L.Ed.2d at 669, 675. So viewed, Philadelphia's demand that the tri-county municipalities incur substantial costs for a short-term solution is not so much a request for a less discriminatory alternative as it is an attempt to place an excessive burden on those municipalities. The ideal is even-handedness. Sporhase v. Nebraska, supra, 458 U.S. at 956, 102 S.Ct. at 3464, 73 L.Ed.2d at 1265. That the injunction operates evenhandedly is apparent from the burden it places on the three counties to develop permanent alternatives.

495 A.2d at 59 (App. at 45A-46A).

REASONS FOR GRANTING THE WRIT

I. The exclusion of all out-of-state solid waste from the Kinsley Landfill by the New Jersey courts is an act of economic protectionism that constitutes a per se violation of the Commerce Clause of the United States Constitution.

The preliminary injunction sub judice is embued with the two evils found to be abhorent to the Commerce Clause: economic isolationism and local preference concerning access to resources. As this Court has stated:

> The few simple words of the Commerce Clause -- "The Congress shall have Power ... To regulate Commerce ... among the several States..." -- reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. 332, 325

(1979). The Commerce Clause is premised on the Nation being a single, indivisible unit:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in Baldwin v. G.A.F. Seelig, Inc. 294 U.S. 511, 527, 79 L ed 1032, 1040, 55 S Ct 497, 101 ALR 55, "what is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation." In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-538 (1949); accord, City of Philadelphia v. State of New Jersey, 437 U.S. 617 (1978).

The November 13, 1984 preliminary injunction and its subsequent clarifica-

tion represent the state of New Jersey's decision to isolate New Jersey from a concern that is currently plaguing the national economy: the rising cost of disposing of solid waste. In this regard, the order of the New Jersey trial court attempts to preserve state landfill resources for local New Jersey communities and to minimize for as long as possible the financial expenditures which these New Jersey communities must make to deal with this national problem, by imposing on all of the out-of-state waste generators who had formerly used Kinsley Landfill the full costs of conserving those New Jersey landfill resources. The situation effectuated by this injunction is the same as that which the Court faced in Philadelphia v. New Jersey, 437 U.S. 617 (1978), when New Jersey attempted to legislate the exclusion

of out-of-state solid waste from its landfills. In that case, this Court stated:

> [W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders.

Philadelphia v. New Jersey, supra, 437 U.S. at 624 (citations omitted).

Economic protectionism may be established by showing that the state action complained of purposefully discriminates against interstate commerce, see Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977); or it may be established by showing that the state action has a discriminatory effect. See Philadelphia v. New Jersey, supra. Accord, Bacchus Imports, Ltd. v. Dias, ___ U.S. ___ 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). In

the instant case, there can be no question that the effect of the judicially created order is to discriminate against all interstate commerce in the disposal of solid waste at the Kinsley Landfill, while permitting virtually every New Jersey community which had formerly utilized the landfill to continue to do so. Although the original order of the trial court did state that only the three counties in southern New Jersey would be permitted to continue to use Kinsley, the New Jersey Supreme Court recognized that "[v]irtually all the solid waste generated within New Jersey that is deposited at the landfill emanates from Gloucester, Camden and Salem Counties [the very same three counties]." Borough of Glassboro v. Gloucester County Board of Chosen Freeholders, 100 N.J. 134, 495 A.2d 49, 51 (1985) (emphasis added).

Furthermore, on November 29, 1984, the trial court modified its November 13 order to permit sewage sludge from all New Jersey communities, including those located in northern New Jersey to be disposed of in the Kinsley Landfill. This modification accounts for almost all of the New Jersey generated waste that was originally excluded. Thus, the practical effect of the trial court's order was not to restrain both intrastate and interstate commerce as the New Jersey courts have maintained, but rather to ban all interstate commerce from Kinsley, while reserving to the residents of the state of New Jersey the right to dispose of their wastes in the landfill as usual.

The New Jersey courts' characterization of the preliminary injunction as a ban on all commerce other than that of the three

specified New Jersey counties is not controlling on this Court. In considering a challenge to state action under the Commerce Clause, it is the practical impact of the state action that is dispositive:

> [W]hen considering the purpose of a challenged statute [or act], this Court is not bound by "[t]he name, description or characterization given it by the legislature or the courts of the State," but will determine for itself the practical impact of the law.

Hughes v. Oklahoma, supra, 441 U.S. at 336, citing Lacoste v. Lousiana Department of Conservation, 263 U.S. 545, 550 (1924).

Not only does the preliminary injunction in question have the effect of discriminating against interstate commerce, but a close scrutiny of the facts surrounding the issuance of said injunction also highlights the discriminatory purpose of the this extraordinary relief and its inherent economic protectionism and parochialism.

In determining that no alternative waste disposal sites to Kinsley Landfill existed for Gloucester, Salem and Camden counties, the trial court adopted the report prepared by the New Jersey Department of Environmental Protection ("DEP") which had only considered "feasible" solid waste disposal facilities located in New Jersey:

> DEP has examined the alternative waste disposal sites in the State of New Jersey. As set forth in Exhibit "A" annexed hereto, DEP concludes that at present no alternative sites in the State of New Jersey to which it would be feasible to redirect the waste flows presently disposed of at the Kinsley Landfill. (App. at 200A).

DEP had not addressed possible alternative sites in Pennsylvania or elsewhere. In fact, an alternative landfill site in Pennsylvania was discarded by the trial court on the basis of the additional expense which local communities would be

forced to bear. The trial court had found that at the time these proceedings were instituted, Gloucester County was prepared to enter an agreement for the disposal of waste at the Colebrookedale Landfill, located in Bucks County, Pennsylvania:

> There is testimony before this court, and I so find, that the [Gloucester] county is currently negotiating for an alternate site, a place called Colinville-Brookdale [sic] in Pennsylvania and I so find that it was approximately 75 miles from Gloucester County. I further find that the verified allegations of the plaintiff municipalities state that their existing budgets, equipment and manpower at this time are not capable of effectively disposing wastes to these alternate sites.

Stenographic Transcript of Decision of Superior Court of New Jersey, Law Division, Gloucester County (October 26, 1984) at 11-12.

Indeed, Gloucester County's negotiations with Colebrookedale were one of

the reasons underlying the institution of the original proceedings. The principle objection of respondent-plaintiff Borough of Glassboro to the Colebrookedale Landfill as an alternative to Kinsley, as evidenced in the complaint, is the additional monies the New Jersey municipality would have to expend for dumping fees, fuel, additional equipment, etc., in disposing of its waste there. See Complaint of Borough of Glassboro, Fourth Count, paras. 9-15 (App. at 149A-154A). Moreover, the opinions of the New Jersey courts are replete with references to the nonavailability of alternatives to Kinsley Landfill due to the increased financial burdens which would be placed upon local New Jersey communities. For example, the New Jersey Superior Court, Appellate Division, stated:

The record clearly shows that Philadelphia had the equipment and logistical capacity to route its solid waste elsewhere than Kinsley but that the 59 much smaller governmental entities in the New Jersey tricounty area had no feasible alternative to Kinsley because they lacked equipment and other resources to meet the imminent sanitary threat. The record demonstrates that the economic impact of the emergency order issued by Judge DeSimone was only modestly adverse to Philadelphia's Streets' Department budgeted item for this service, about 5% increase which would decrease to 2% after the first year. (Four million of a $91 million annual Streets' Department budget for the first year). Philadelphia's population is about 1.7 million. The economic effect on the 59 local municipalities dependent on Kinsley would have been enormous, assuming indeed there was any possible alternative to the order. Glassboro's budget for solid waste disposal could escalate from $100,000 to $1,000,000 per year for a town of 14,500. Some towns, such as Clayton, Elmer and Woodstown had no alternative to their present private hauler service if Kinsley were closed without access to an alternate local source. The private haulers would simply close down. There was credible evidence before the judge that Camden County's cost could rise from $8 million

> annually to greater than $12 million annually. Camden County has a population of about 500,000. We conclude that Judge DeSimone, in reality, had no choice in the matter but to act as he did to insure public safety. If our conclusion is soundly based, the constitutional arguments raised by appellants fail of necessity.

Glassboro v. Gloucester County Board of Chosen Freeholders, 199 N.J. Super. 91, 488 A.2d 562, 567 (1985), aff'd, 100 N.J. 134, 495 A.2d 49, 58 (1985) (App. at 65A-67A).

This state-imposed burden on all of the interstate commerce which flowed into Kinsley Landfill "cannot be squared with the Commerce Clause when ...[it] serve[s] only to advance 'simple economic protectionism.'" New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982). In the New England Power case, this Court, in an unanimous opinion, held a New Hampshire Public Utilities Commission order

which restricted to New Hamsphire the flow of hydroelectric power, privately owned and produced by a public utility company, to be a per se violation of the Commerce Clause, where the premise of such restriction was that New Hampshire customers could save approximately 25 million dollars a year.

There exist no relevant distinction between the purpose and the effect of the New Jersey courts in fashioning and sustaining the validity of the preliminary injunction in question and that of the New Hampshire Public Utilities Commission order. The conservation of the taxpayers' purse is insufficent grounds to sustain a burden upon the commerce clause. See, e.g., Edwards v. California, 314 U.S. 160 (1941) (invalidating state statute that prohibited anyone from bringing an indigent person into California, despite the Court's

acknowledgment of the severity of the financial burden on the state which the statute sought to address.) See also, Memorial Hosiptal v. Maricopa County, 415 U.S. 250 (1974); and Shapiro v. Thompson, 394 U.S. 618 (1969). In the Memorial Hospital case, supra, in response to a constitutional challenge under the Equal Protection Clause, the Court ruled that constitutional rights may not be impaired to conserve the public fisc:

> The conservation of the taxpayers' purse in simply an insufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State.

Id., 415 U.S. at 263.

Accordingly, the exclusion of the City of Philadelphia's and all other out-of-state solid waste from Kinsley Landfill by the New Jersey courts is a blatant act of eco-

nomic protectionism which constitutes a per se violation of the Commerce Clause.

II. This Court has consistently declared violative of the Commerce Clause, the acts of state legislatures and of state judiciaries which confer upon their respective residents a preferred right of access over out-of-state consumers to privately owned resources.

It is well established that the Commerce Clause "precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." New England Power Co. v. New Hampshire, supra, 455 U.S. at 338 (citations omitted). Moreover, there exists a basic principal of Commerce Clause jurisprudence that a "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of

the State." Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928)).

In support of the propriety of the trial court's preliminary injunction, the New Jersey Supreme Court relied heavily upon this Court's opinion in Sporhase v. Nebraska, 458 U.S. 941 (1982). In that case, the Court held that the reciprocity requirement of a Nebraska statute regulating the withdrawal and transportation of ground water across the state's boundaries violated the Commerce Clause by imposing an impermissible burden upon interstate commerce. In Sporhase, the Court stated, however, that it was reluctant to condemn as unreasonable measures taken by a state to conserve and preserve "vital" resources for its own citizens, and that this reluctance stemmed from the "'confluence of [several] realities.'" Id., 458 U.S. at

956, quoting Hicklin v. Orbeck, 437 U.S. 518, 534 (1978). One such "reality" was that the resource which a state seeks to preserve for the use of its own citizens has "some indicia of a good publicly produced and owned." Id., 458 U.S. at 957, citing Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

However, in the case now before this Court, no such public ownership of Kinsley Landfill is involved. Indeed, even the New Jersey Supreme Court has acknowledged that, even though it is subject to regulation by DEP and the state Board of Public Utility Commissioners, "Kinsley Landfill, Inc. (Kinsley) is a privately-owned landfill" (App. at 4A). Since no condemnation of Kinsley has ever been effected, the fact that Kinsley is subject to state regulation, as was the public utility in New

England Power Co. v. New Hampshire, supra, does not convert that landfill into "'a good publicly owned and produced,'" as the New Jersey Supreme Court has found. 495 A.2d at 58, quoting Sporhase v. Nebraska, supra, 458 U.S. at 597 (App. at 39A).

Indeed, this Court has previously rejected in Philadelphia v. New Jersey, supra, the very same argument put forth by New Jersey in support of this direct prohibition against all interstate commerce flowing into the Kinsley Landfill, namely, the need to conserve landfill sites in New Jersey, which are scarce resources, for the needs of local New Jersey communities.

The DEP report, adopted in its entirety by the trial court, states that:

> At present there is a critical shortage of solid waste disposal facilities in the State of New Jersey which has reached a crisis stage. There are very few operating landfills remaining in the State of New Jersey, and many of those that are remaining are

> rapidly running out of disposal capacity. At present, there are few proposals for additional landfills that have even reached the planning stage, and no additional landfills are presently under construction. A similar situation exists for resource recovery facilities. Resource recovery facilities are essential for a long-term solution to New Jersey's solid waste disposal crisis. (App. at 199A-200A).

The report reiterates the solid waste disposal crisis in New Jersey and then goes on to explain how the complete exclusion of interstate commerce would ameliorate temporarily the situation for New Jersey communities:

> Unfortunately, DEP review indicates that at present rates of waste disposal at the Kinsley Landfill, the capacity of one new lift might be reached in less than four months. Waste generated within the City of Philadelphia and other Pennsylvania communities accounts for the majority of the waste disposed of at the Kinsley Landfill. Accordingly if Kinsley Landfill ceased accepting this waste, it is projected that the capacity of the expanded landfill would not be reached for approximately one year.

> Again we note the critical shortage of landfill disposal space within the State of New Jersey. Protection of the public health, safety and welfare presents an urgent need to preserve this limited space so that it will be possible to provide some place for the disposal of solid waste generated within this State until long-term solutions to this waste disposal crisis are implemented. (App. at 203A-204A).

The scarcity of private landfills in New Jersey was rejected in this Court's opinion in Philadelphia v. New Jersey, supra, as a justification, in the face of a challenge under the Commerce Clause, for reserving private resources for the sole benefit of New Jersey communities at the expense of out-of-state waste generators:

> The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space. It is true that in our previcus cases the scarce natural resource was itself the article of commerce, whereas here the scarce

> resource and the article of commerce are distinct. But that difference is without consequence. In both instances, the State has overtly moved to slow or freeze the flow of commerce for protectionist reasons. It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

Philadelphia v. New Jersey, supra, 437 U.S. at 628 (emphases added).

Similarily, in Pennsylvania v. West Virginia, 262 U.S. 553 (1923), a West Virginia statute prohibited the exportation of its natural gas unless an adequate supply was available to meet the needs of its citizens. Although the Court recognized that "the gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy

local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the state," the statute was nonetheless found to be violative of the Commerce Clause. Id., 262 U.S. at 598 (emphasis added). The Court's abhorence to acts conferring this type of local preference is well documented. See, e.g., Hughes v. Oklahoma, supra, 441 U.S. at 322 (declaring unconstitutional a statute prohibiting transport or shipment outside of the state of minnows seized or procured within state waters); Foster-Fountain Packing Co. v. Haydel, supra, 278 U.S. 1 (1928) (invalidating a statute requiring shrimp processing to be done in-state); and West v. Kansas Natural Gas Co., 211 U.S. 229 (1911) (statute proscribing the exportation of natural gas outside of the state declared unconstitutional.)

To permit a state to retain its resources within its boundaries for the exclusive use of its own residents is to defeat the unifying purpose of the Commerce Clause and to invite the division and retaliatory behavior on the part of the other states.

> If the States have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? ... To what consequence does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines' ... But rather let us say it is constituted of the welfare of all of the States and that each State is made greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States.

West v. Kansas Natural Gas Co., supra, at 221 U.S. at 255 (emphasis added).

Accordingly, because it gives local New Jersey communities a preferential right of access to Kinsley, a privately owned landfill, to the exclusion of all out-of-state waste generators, the November 13, preliminary injunction violates the Commerce Clause.

III. The November 13, 1984 preliminary injunction cannot withstand constitutional challenge even under the more flexible standard of Pike v. Bruce Church, Inc.

Where the state act, which affects interstate commerce, regulates interstate and intrastate commerce evenhandedly, and where the act advances a legitimate state concern, the constitutional question may be resolved by employing the balancing test articulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. ... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Accord, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471, (1981); Hughes v.

Oklahoma, supra, 441 U.S. at 336; Philadelphia v. New Jersey, supra, 437 U.S. at 624.

The threshold inquiry under the Pike test is whether the preliminary injunction regulates commerce evenhandedly. The lack of "evenhandedness" is established by showing that the New Jersey court's order does not impose incidental effects upon interstate commerce, but rather "discriminates against interstate commerce either on its face or in practical effect." Hughes v. Oklahoma, supra, 441 U.S. at 336. As petitioner has set forth above at pages 28-36, the order in question possesses both a discriminatory purpose and a discriminatory impact. The November 13 order prohibits the flow of all interstate commerce into Kinsley Landfill, while permitting the flow of virtually all intrastate commerce

into the landfill. The order overtly blocks the flow of interstate commerce at New Jersey's boundaries. New Jersey's contention that the preliminary injunction is directed toward and impacts intrastate commerce as well as interstate commerce lacks merit. The original order permitted generators of 94% of the New Jersey solid waste that had formerly found its way to Kinsley to continue to dispose of their waste there. As that order was modified on November 29, virtually all of the communities which generated the remaining six percent of the New Jersey waste disposed of at Kinsley were allowed to resume their disposal activities at the landfill.

Contrary to the view of the New Jersey Supreme Court, the burden imposed upon interstate commerce is not incidental. The state court's reasoning with respect to

this matter is patently disingenuous:

> Were it not for the injunction . . . the landfill would be closed not only to former customers outside the tri-county area, such as Philadelphia, but also to those within the three counties. So considered, the effect of the injunction on interstate commerce is incidental.

495 A.2d at 58 (App. at 24A). The test of whether a burden on commerce is incidental or not is whether there exists a direct regulation of commerce or whether the effect on commerce is merely incidental to a neutral regulation. See Pike v. Bruce Church, Inc., supra, and progeny. This distinction was recently elaborated on by this Court in Edgar v. Mite Corporation, 457 U.S. 624, 640 (1982):

> The Commerce Clause . . . permits only incidental regulation of interstate commerce by the States; direct regulation is prohibited. ... The Illinois Act violates these principles for two reasons. First, it directly regulates and prevents, unless its terms are

> satisfied, interstate tender offers which in turn would generate interstate transactions.

Id. (citations omitted)(emphasis in original). Similarly, in Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925), this Court stressed that "a state statute which, by its necessary operation, directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose for which it was enacted." Id.(emphasis added).

With respect to the instant case, where the necessary result of the preliminary injunction is to proscribe the flow of all relevant interstate commerce into Kinsley Landfill, the impermissibility of the burden is unquestionable.

> Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states.

> Such an obstruction is direct by the very terms of the hypothesis.

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935). Consequently, the more flexible balancing test set forth in Pike is not applicable to the matter at hand.

Although, as set forth above, the injunction is not entitled to the more flexible balancing test, for argument's sake, petitioner will address the remaining elements of the Pike standard.

Once the party challenging the state's action demonstrates the discrimination against interstate commerce, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute [in this instance the preliminary injunction] and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." Hunt v. Washington

State Apple Advertising Commission, supra, 432 U.S. at 353. See Hughes v. Oklahoma, supra, 441 U.S. at 336.

The purported legitimate state concern underlying the extraordinary judicial relief granted in the instant case is one of concern for the exhaustion of finite landfill space in New Jersey. Assuming, arguendo, that the concern as expressed above is a legitimate concern, the judicial order still fails to survive constitutional muster because of the means chosen to effectuate it. As this Court stated in Philadelphia v. New Jersey:

> This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case. Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative ends. Thus, it does not matter whether the ultimate aim of ch 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining

> open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Philadelphia v. New Jersey, supra, 437 U.S. at 626-627. The injunctive means which New Jersey has employed in the proceedings below to protect its communities' interests in a scarce resource is prohibited by the Commerce Clause and cannot be excused by the cry of public good, because "[a] presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." Id., 437 U.S. at 627. The New

Jersey court's order, intended to preserve landfill capacity at Kinsley, discriminates against solid waste generated outside of the New Jersey borders not on the basis of the content or nature of such waste, but simply on the basis of its origin.

In order to have avoided illegitimate means to achieve its purpose, the New Jersey trial court was constrained to select the means which had the least impact upon interstate commerce. See Hughes v. Oklahoma, supra, 441 U.S. at 338. In the New Jersey court proceedings, petitioner proferred several examples of viable solutions which would have had a less severe impact on interstate commerce than does the preliminary injunction ordered by the court, including (1) the creation of additional capacity at Kinsley by means of a second vertical expansion; and (2) per-

mitting Philadelphia, as well as the New Jersey communities, to utilize Kinsley Landfill at reduced levels. On the question of increasing Kinsley's capacity, the trial judge found that "the design of a second lift and the approval of the same and its subsequent implementation is not relevant to the City of Philadelphia . . . ." Stenographic Transcript of Decision of Superior Court of New Jersey, Law Division, Gloucester County (November 21, 1984) at 70-71. Similiarly, the City's request for an across-the-board proportional allocation of the available space at Kinsley Landfill was also rejected, without a judicial determination of the effect such a plan would have had on the alleged immediate and irreparable harm to plaintiffs below.

Thus, even under the flexible Pike standard, the order of the New Jersey trial

court cannot withstand a constitutional challenge.

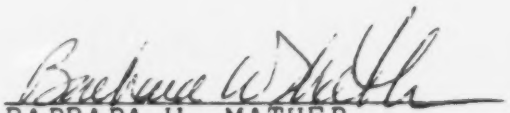
CONCLUSION

The state of New Jersey has attempted to isolate itself from the growing national concern for the disposal of solid waste. The extraordinary injunctive measure taken by the New Jersey Superior Court in barring the City of Philadelphia and all other out-of-state waste generators from disposing of their solid waste at Kinsley Landfill, in order to conserve New Jersey's landfill resources for New Jersey communities, is an anathema to the Commerce Clause of the United States Constitution. Moreover, such action by the state court merely sets the stage for further parochial disharmony among states over this grave national problem, in contravention of this Court's opinion in Philadelphia v. New Jersey. Accordingly, petitioner, City of Philadelphia, requests that this Court grant

it a hearing on the merits of this matter so that the decision of the Supreme Court of New Jersey may be reversed.

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and the opinion of the New Jersey Supreme Court.

Respectfully submitted,



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